Holo-Krome Company *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), Local 376. Case 39–CA–3112

April 5, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND RAUDABAUGH

The central issue on remand from the United States Court of Appeals for the Second Circuit is whether the Respondent's refusal to rehire two employees can be shown to be unlawfully motivated, without reference to statements made by the Respondent's officials opposing unionization.[1] In the initial decision in this proceeding, a majority of the Board relied, inter alia, on statements opposing unionization made by the Respondent's officials during the Union's organizing campaign as evidence of antiunion animus.[2] On review of the Board's decision, the court found that the Board majority's reliance on the Respondent's expressions of opposition to unionization as a basis for finding antiunion animus was contrary to Section 8(c) of the Act[3] which protects such expressions if, as here, they contain no threat of reprisal or force or promise of benefit. Noting that the Board referred to other incidents in drawing the inference that the Respondent's refusal to rehire Pace and Rutkauski was unlawfully motivated, the court remanded the case to the Board to determine whether it would reach the same result without consideration of the Respondent's protected statements.

The Board has accepted the court's remand and therefore accepts the court's opinion as the law of the case. Having considered our decision in light of the court's opinion, we reaffirm our findings that the Respondent violated Section 8(a)(1), (3), and (4) by refusing to hire Pace and Rutkauski because of their union activities and/or because they were named in an unfair labor practice charge filed with the Board by the Union. We stress that although we cited the Respondent's stated opposition to the Union as evidence of antiunion animus, it was a relatively minor factor in our decision that the General Counsel had established a prima facie case concerning the alleged violations. As discussed below, the major factors in our decision were the express hostility shown to Pace by Plant Manager Campbell and Director of Industrial Relations Wing, the unexplained inconsistencies or shifts in the Respondent's treatment of the discriminatees' requests for work, and the inference of unlawful motivation that is drawn from the Respondent's failure to give a credible explanation of its reasons for refusing to hire Pace and Rutkauski. None of these factors is dependent on or otherwise related to the Respondent's permissible statements of opposition to the Union.[4] Accordingly, without consideration of the Respondent's expressions of opposition to the Union, we conclude that the Respondent violated the Act as alleged.

At the outset, we note that certain elements of the General Counsel's case are not at issue. It is undisputed that Pace and Rutkauski were active in the Union's 1985 organizing campaign and were involved in the Union's unfair labor practice charge (39–CA–3024) alleging that the Respondent unlawfully laid off and failed to recall these two employees. It is also undisputed that the Respondent knew of the discriminatees' activity and did not rehire them when they sought work in June and July 1986. This refusal to rehire occurred shortly after the Regional Director notified the Union on June 13, 1986, that the General Counsel would not issue a complaint on the unfair labor practice charge involving Pace and Rutkauski in that earlier case. The issue in this case is whether the General Counsel established a prima facie case by showing that the protected activity was a motivating factor in the Respondent's decision not to rehire Pace and Rutkauski in 1986. We reaffirm our original conclusion that the General Counsel made such a showing.

The General Counsel presented the following evidence of the Respondent's animus against the Union and against those who seek access to the Board.[5] Plant Manager George Campbell, who was involved in the decision not to rehire Pace and Rutkauski, acted as the Respondent's observer in the May 1985 election.[6] After the Union lost the election, Pace, who was an

[1] On March 31, 1989, the National Labor Relations Board issued its Decision and Order in this proceeding in which it found that the Respondent violated Sec. 8(a)(1), (3), and (4) of the National Labor Relations Act by refusing to hire employees Pace and Rutkauski because of their union activities or because they were named in an unfair labor practice charge filed by the Union against the Respondent. 293 NLRB 594. On September 20, 1989, the Board issued an Order Correcting Error of its original decision. Subsequently, the Respondent filed with the U.S. Court of Appeals for the Second Circuit a petition for review of the Board's Order, and the Board filed a cross-petition for enforcement of its Order.

In an opinion dated July 9, 1990, the court denied enforcement of the Board's Order and remanded the case to the Board for reconsideration consistent with the court's opinion. *Holo-Krome Co. v. NLRB*, 907 F.2d 1343 (2d Cir. 1990).

By letter dated October 11, 1990, the Board notified the parties that it had accepted the court's remand and that statements of position could be filed with respect to the issues raised by the court's opinion. Thereafter, the General Counsel, the Charging Party, and the Respondent filed statements of position with the Board.

The Board has delegated its authority in this proceeding to a three-member panel.

[2] Member Cracraft expressly did not rely on such statements of opposition to the Union in finding antiunion animus. 293 NLRB 594, 59?? fn. 6.

[3] Sec. 8(c) provides that: ''The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.''

[4] Indeed, Member Cracraft's original opinion was based solely on these factors.

[5] The following discussion is based on the findings of fact more fully set forth in the Board's original decision, 293 NLRB at 594–595.

[6] Campbell was a maintenance mechanic at that time.

observer for the Union, approached Campbell and offered to shake his hand, saying ''no hard feelings.'' Campbell replied that he (Campbell) ''didn't say that'' and then turned and walked away. Thus Campbell, who was later in a position to affect Pace and Rutkauski's applications for work, expressed hostility or hard feelings toward the Union's effort and toward Pace specifically. In addition, when Pace told Director of Industrial Relations Wing that he was applying for the job that was advertised, Wing angrily threw several newspaper advertisements on the desk and asked Pace to choose one. The two then got into an argument over recall rights which had been the subject of the Union's unfair labor practice charge against the Respondent.[7] When Pace later asked Wing about a job opening in April 1987, Wing said that Pace's chances of ever returning to the Respondent's employ were ''nil'' but that he would deny ever having told Pace that.

The above encounters show a hostility to employee involvement with the Union and with Board processes. The finding of antiunion animus and hostility to involvement in Board processes is one element of the General Counsel's prima facie showing that the refusal to rehire was motivated by the employees' union activity and involvement in Board processes. Other elements include the shifts and inconsistencies in the Respondent's explanation for refusing to hire Pace and Rutkauski. More specifically, we note the circumstances surrounding Pace and Rutkauski's requests for work. On June 26, 1986, when Rutkauski asked Wing about job openings, Wing told Rutkauski there were none. In fact, Wing was aware of one job opening (toolcrib attendant) and he admitted that he thought Rutkauski might be interested in that position. The following day when Wing received requisitions for operator positions, he did not contact Rutkauski who had just expressed a keen interest in job openings. Instead, Wing placed ads in the newspaper for these positions, despite the Respondent's admitted policy of hiring by word of mouth. When Pace responded to the ad and called Wing on June 30, 1986, Wing told him to come in and apply. However, when Pace did so only 2 days later, he was told the jobs were filled. When Rutkauski applied the following day, he also was informed that the jobs were no longer available.[8]

We find that this evidence of shifts or inconsistencies in the Respondent's treatment of the discriminatees' requests for work, coupled with the evidence of animus discussed above, constitute support for a prima facie showing that the Respondent did not inform Pace and Rutkauski about job openings and changed its decision to fill openings because it did not want to hire employees who had previously attempted to bring in a union and who had been involved in a Board charge against the Respondent.

Finally, we find that the General Counsel's showing of unlawful motivation is also supported by the Respondent's failure to give a credible explanation for its reasons for refusing to hire Pace and Rutkauski. *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466 (9th Cir. 1966); *Baumgardner Co.*, 288 NLRB 977 fn. 4 (1988), enfd. mem. 866 F.2d 1411 (3d Cir. 1988). See also *Abbey's Transportation Services*, 284 NLRB 698, 701 (1987), enfd. 837 F.2d 575 (2d Cir. 1988). In this regard, we reaffirm our initial analysis that the Board's decision in *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), did not disturb the well-established principle set forth in the above-cited cases that if the stated motive for a discharge (or refusal to hire) is false, the trier of fact may infer that there is another motive that the employer wishes to conceal—an unlawful motive—where the surrounding facts tend to reinforce that inference. Id. at 1088 fn. 12.

We reaffirm our agreement with the judge's finding that the Respondent's reasons for not hiring the discriminatees are not persuasive. For the reasons set forth in our original decision, we do not believe the Respondent's assertion that the advertisement of job openings was a mistake, or that there was a specific plan to automate the grinder machine and to fill a job opening by granting employee Ovrahim's request to transfer. In addition, we again note that the Respondent offered no explanation for Wing's failure to mention a job opening that he thought would interest Rutkauski or his failure to contact Rutkauski when he received the job requisitions. We conclude that the Respondent's failure to give a credible reason for not offering jobs to Pace and Rutkauski reinforces the inference that the Respondent's true reasons were unlawful.

Accordingly, for all of these reasons, we find that the General Counsel established a prima facie case that Pace and Rutkauski were denied employment because of their protected activity. We further find, for the reasons stated in our original decision, that the Respondent failed to meet its burden under *Wright Line* of showing that it would not have rehired either employee even in the absence of their union activities or involvement in Board processes.

On remand, the court further directed the Board, in the event it found that the Respondent had an obligation to rehire Pace, to determine whether the Respondent had met that obligation.[9] We find that the Respondent has not done so.

The Respondent contends that in January 1987 it tried several times to reach Pace by telephone and sent

[7] Wing testified that Pace displayed ''not a very good attitude'' and specifically referred in this regard to Pace's argument about the recall policy.

[8] The Respondent asserted that the jobs were closed because Plant Manager Campbell wanted to fill one by transfer and the other by automation.

[9] This issue had been left to compliance in the order correcting error issued September 20, 1989.

Pace a certified letter offering him a job. It argues that Pace's failure to respond to the offer or to contact the Respondent constituted a rejection of an offer of reemployment and ended the Respondent's obligation to Pace. The text of the Respondent's letter, dated January 28, 1987, from Director of Industrial Relations Wing reads:

> I have tried unsuccessfully to reach you by phone for the past few days. I want to talk with you regarding a job opportunity for which you are qualified.
>
> If you are interested you should contact me no later than January 30, 1987. If I have not heard from you by that time, I will assume you have no interest and will proceed accordingly.

We find that the Respondent's letter does not constitute a valid offer of employment. It is well settled that an offer of employment must be specific, unequivocal, and unconditional in order to toll backpay and satisfy a respondent's remedial obligation. *Brenal Electric*, 271 NLRB 1557 (1984); *L. A. Water Treatment*, 263 NLRB 244, 246–247 (1982); *Standard Aggregate Corp.*, 213 NLRB 154 (1974). The Respondent's January 28 letter does not meet these requirements. The letter does not mention a specific job or even a job classification. It merely speaks of a ''job opportunity.'' Further, the Respondent's letter does not make an express offer of a job to Pace but, instead, states a desire to ''talk'' with Pace about a job opportunity for which he is qualified. We, therefore, find that the Respondent did not make a valid offer of employment in the January 28 letter.[10]

AMENDED REMEDY

In the September 20, 1989 Order Correcting Error in the Board's original decision, the Board found that Guiseppe Pace was entitled to an offer of immediate and full employment to the position for which he is qualified and in which he would have been employed but for the discrimination against him. However, the Board found that John Rutkauski was not entitled to such an offer because the General Counsel conceded that the Respondent fulfilled its obligation to rehire Rutkauski and terminated its backpay obligation with respect to him when Rutkauski accepted the employment offered by the Respondent. We reaffirm these findings. However, we correct an inadvertent error noted by the court on remand and find that the date on which Rutkauski accepted the Respondent's offer of employment is January 19, 1987.

Accordingly, we shall order that the Respondent offer Guiseppe Pace immediate and full employment to the position for which he is qualified and in which he would have been employed but for the discrimination against him, without prejudice to his seniority or any other rights and privileges to which he would be entitled absent the discrimination against him. We shall also order that the Respondent make Guiseppe Pace whole for any loss of earnings or other benefits from the date he would have been employed but for the discrimination against him until the date of a proper offer of reemployment and that the Respondent make John Rutkauski whole for any loss of earnings or other benefits from the date he would have been employed but for the discrimination against him until the date of his reemployment on January 19, 1987, with backpay to be computed in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and with interest to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Finally, we shall order that the Respondent remove from its records any references to the unlawful refusal to rehire Guiseppe Pace and John Rutkauski, provide them with written notice of such removal, and inform them that the unlawful refusal to rehire will not be used as a basis for future personnel actions concerning them. See *Sterling Sugars*, 261 NLRB 472 (1982).

ORDER

The National Labor Relations Board orders that the Respondent, Holo-Krome Company, West Hartford, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to hire, reemploy, or otherwise discriminate against employees because of their engaging in protected activity.

(b) Refusing to hire, reemploy, or otherwise discriminate against employees because they have filed charges with, or otherwise aided and assisted, the National Labor Relations Board in the performance of its functions.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Guiseppe Pace immediate and full employment to the position for which he is qualified and in which he would have been employed but for the discrimination against him, without prejudice to his seniority or any other rights and privileges to which he would be entitled absent the discrimination against him, and make Guiseppe Pace and John Rutkauski whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in

[10] This result is not affected by the judge's discrediting of Pace's explanation for failing to respond to the letter. Regardless of the reasons for Pace's failure to respond to the Respondent's telephone calls or the January 28 letter, the fact remains that the Respondent failed to make a valid offer of reemployment.

the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the unlawful refusal to hire Guiseppe Pace and John Rutkauski and notify the employees in writing that this has been done and that the unlawful refusal to hire will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its West Hartford, Connecticut facility copies of the attached notice marked ''Appendix.''[11] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[11] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us post and abide by this notice.

WE WILL NOT refuse to hire, reemploy, or otherwise discriminate against employees because of their protected activities.

WE WILL NOT refuse to hire, reemploy, or otherwise discriminate against employees because they file charges with, or otherwise aid and assist, the National Labor Relations Board in the performance of its functions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Guiseppe Pace immediate and full employment to the position for which he is qualified and in which he would have been employed but for the discrimination against him, without prejudice to his seniority or any other rights and privileges to which he would be entitled absent the discrimination against him and WE WILL make Guiseppe Pace and John Rutkauski whole for any loss of earnings or other benefits they may havesuffered because of the discrimination against them, with interest.

WE WILL remove from our files any reference to the refusal to hire Guiseppe Pace and John Rutkauski and notify them in writing that this has been done and that evidence of their unlawful refusal to hire will not be used as a basis for future personnel actions concerning them.

HOLO-KROME COMPANY